

<b>State of South Carolina</b>	)	<b>Before the Chief Procurement Officer</b>
	)	
<b>County of Richland</b>	)	<b>Decision</b>
	)	
<b>In Re: Protest of Melhart Music Center</b>	)	
	)	<b>Case 2009-116</b>
	)	
<b>Protest of Award: Solicitation: USC-IFB-1425-</b>	)	<b>Posted: 05/27/2009</b>
<b>LW-Rebid, Furnish, Deliver, and Install New</b>	)	<b>Mailed: 05/27/2009</b>
<b>Music Equipment for Band Hall.</b>	)	
	)	
	)	

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The South Carolina Consolidated Procurement Code grants the right to protest to any bidder who is aggrieved in connection with the solicitation or award of a contract. Melhart Music Center filed a protest of the award to Wenger Corporation of a contract resulting from solicitation USC-IFB-1425-LW-Rebid, Furnish, Deliver, and Install New Music Equipment for Band Hall, (Attachment 1) issued by the University of South Carolina. A hearing concerning this matter was conducted by the Chief Procurement Officer for Information Technology (CPO) on May 14, 2009. In attendance at the hearing were representatives of Melhart Music, Wegner, and the University of South Carolina.

### **Findings of Fact**

Solicitation Issued	03/06/2009
Amendment 1 Issued	03/13/2009
Bids Received	03/24/2009
Intent to Award Issued	04/07/2009
Protest by MMC	04/08/2009
Intent to Award Suspended	04/09/2009

### **Background**

This solicitation was issued by the University of South Carolina as an Invitation For Bids under §11-35-1520 of the Code, to acquire new music furniture and equipment for the Band Hall. The IFB included brand name or equal specifications listing Wenger products and authorizing the bid of products equal to the Wenger products. (IFB at page 9) Bids were received from Melhart for \$147,691 and Wenger for \$198,520. The IFB required bidders offering products other than

Wenger to include the manufacturer's latest literature showing complete product specifications. (IFB at page 8) Melhart's bid did not include such literature. After opening, USC requested and received additional specification sheets.

Melhart's low bid was declared non responsive for three reasons documented in a Memo To Record (Attachment 2) prepared by the procurement manager, specifically:

1. Melhart Model # SRBOCUBLK chairs bid for Item #16 (Musician Chair):  
\*Chairs bid by Offeror are not steel according to its product literature.
2. Melhart Model #48 bid for Item #18 (Music Stands):  
\*Music Stand bid by Offeror are not steel according to its product literature; and
3. Melhart Model #'s 15-20 ACH, 10-30 ACH, 10-40 ACH, 6+1-40ACH, 3-30 ACH, 3W-30 ACH, and 2-40ACH cabinets bid for Item #'s 1-7 (Music Education Storage casework, Acousti-cabinets, compartmental grill doors, Cherry laminate):  
\*Cabinets bid by Offeror are not composite wood with thermoset polyester laminate according to its product literature.

Melhart complains, in pertinent part, that:

- The items being used to disqualify Melharts (sic) bid are superficial and are not the most ethically advantageous to the State.
- The items being used to disqualify Melharts (sic) bid discriminate against effective broad based competition for public procurement with in the free enterprise system.
- The items being used to disqualify Melharts (sic) bid are not responsive to appropriate user needs, and are not in good faith to qualify those disqualifying specifications
- The items being used to disqualify Melharts (sic) bid are not fair and equitable treatment to competitive bidders, and tend to loose (sic) public confidence of the bidding process.
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The specifications set forth in this finding to disqualify Melharts (sic) bid are items that even if they were true, which they are not, would have nothing to do with the function (sic) ability of the product to perform for the actual needs of the product. ... This action appears to be adversarial to selected portions of the South Carolina Procurement Code 11-35-20 and 11-35-30.

## Discussion

In its initial bid, Melhart failed to include literature describing the chairs it bid in response to item 16 of the IFB. USC waived this as a minor informality and requested the missing literature. The chairs Melhart bid in response to item #16 were then rejected in USC's Memo to Record because they were not steel yet, in literature provided in response to USC's request for additional information, clearly shows that the chairs are made of 18 gauge steel tubing. USC acknowledged that this ground for rejection was a misstatement.

In an email from the using department (Attachment 3), Dr. George Brozak indicated that the Melhart chairs should be rejected because they were plastic and not padded. While the additional product literature Melhart provided USC indicated that the basic construction of the chairs was plastic, it also contained the following statement: "The upholstered posture chair is an option for comfort with a variety of colors." USC made no attempt to clarify this apparent discrepancy prior to rejecting Melhart's bid.<sup>1</sup>

During the hearing before the CPO, USC argued that the Melhart chairs were made of 18 gauge steel and consequently inferior to Wenger's chairs which were constructed of 16 gauge steel. While the thickness of the steel construction can be indicative of the durability of a product, the thickness of the steel construction was not listed as a salient feature in the bid, was not identified in the Memo To Record, nor in Dr. Brozak's email of issues with the Melhart bid.<sup>2</sup> Regardless of their validity, identifying salient features as grounds for rejection for the first time at the hearing before the CPO gives the appearance that USC is searching for reasons to reject Melhart's bid.

Item 18 of the IFB requested bids for 250 Wenger Preface music stands, product number 237A500. Again no salient features were identified in the bid. Melhart bid a Manhasset model 48 music stand. In response to USC's request for additional literature, Melhart mistakenly submitted documentation for a Manhasset model 84 music stand. The Wenger Preface has an aluminum desk, the Manhasset model 48 has an all aluminum desk; but the Manhasset model 84 has a plastic desk,. The discrepancy between the model bid and the documentation supplied was not recognized by USC and Melhart's bid for the music stands was rejected on the documentation provided and not the product bid.

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<sup>1</sup> When asking for product literature the expectation is that what will be received is literature describing the basic item—often without options but noting their availability. Thus, it is not surprising that product literature would be received from Melhart which may note an option which was bid and is only noted as optional on the literature.

<sup>2</sup> Nor was there any testimony that USC appropriately determined that Melhart's 18ga. one inch tubing was weaker or in some way inferior to Wenger's 16ga. 7/8 inch tubing.

Again during the hearing before the CPO, USC raised differences in the construction of the Wenger and Manhasset products and the dimensions of music stand desks as reasons to reject Melhart's bid. Again, these issues did not appear as salient features in the IFB, as issues in the Memo To Record, nor in Dr. Brozak's email.

The third reason in the Memo to Record for rejecting Melhear's bid was that the acoustic cabinets were not composite wood with thermoset polyester laminate.<sup>3</sup> Again, these design considerations were not listed in the IFB as salient features and bidders other than Wenger would have no way of knowing that USC would find this to be reason for rejection. In addition, in the email from the using department, Dr. Brozak observed that the literature provided for the Melhart cabinets indicated that acoustic treatment of the instrument cabinets was a \$50.00 option. While acoustic treatment was implied in the IFB, Melhart's bid did not indicate one way or the other whether the option was included in its bid and USC made no attempt to clarify this issue.

The email from Dr. Brozak also indicated that there was insufficient information in the literature provided by Melhart raising questions about the features and construction of the acoustic cabinets, library system and "Rack 'N Roll" products:

I see no product information on the "Rack 'N Roll" from Melhart. What weights do they hold? What is the metal construction? What is the size of the casters? What are the dimensions?

The Melhart Library system says it is on tracks. How does it support the weight of the unit when it is fully extended? Do the tracks run out into the floor? Are the individual cabinets on casters? What weight do they hold?

Dr. Brozak also had questions about Melhart warranties. Apparently these questions went unanswered.

Budget and Control Board Regulation 19-445.2140 requires specifications clearly describe the State's requirements without being restrictive in nature.

19-445.2140.B. ... All specifications shall be written in a non restrictive manner as to describe the requirements to be met.

This IFB relied on brand-name or equal specifications as authorized:

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<sup>3</sup> Nor was the difference in construction of the cabinets determined to be material based upon the evidence presented.

19-445.2140(2) “Brand Name or Equal Specification” means a specification which uses one or more manufacturer’s names or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet state requirements, and which provides for the submission of equivalent products.

In Re: Protest by General Sales Company, Case No. 1983-5, the Procurement Review Panel noted with regard to brand name or equal specifications:

“Brand-Name or Equal” Specifications should set out all known acceptable brand name products... Where a purchase description is used, bidders must be given the opportunity to offer products other than those specifically referenced if those other products will meet the needs of the State in essentially the same manner as those referenced. It should always be clear that a “Brand-Name or Equal” description is intended to be descriptive not restrictive and is merely to indicate the quality and characteristics of the product that will be satisfactory and acceptable. Products offered as equal must, of course, meet fully the salient characteristics and product requirements listed in the Invitation for Bids.

The CPO also finds observations from the United States Comptroller General In the Matter of: M/RAD Corporation, February 27, 1981, enlightening with respect to brand name or equal specifications at the federal level:

In a brand name or equal procurement, an agency has an obligation to inform bidders (or in this case offerors) of the salient characteristics of the brand name product essential to the needs of the government. This should be done in the purchase description contained in the solicitation. See Defense Acquisition Regulation Secs. 1-1206.2(B), 1-1205.5. We have held that an agency has failed to provide an adequate statement of its needs to allow firms to compete on an equal basis where the solicitation merely lists brand name items which meet the agency’s requirements without listing the items’ salient characteristics; offerors should not be compelled to guess which features of the brand name equipment the contracting agency considers necessary to meet its minimum needs. [DICTAPHONE CORPORATION, B-196512](#), SEPTEMBER 17, 1980, [80-2 CPD 201](#); [LANIER BUSINESS PRODUCTS, INC., B-195346](#), OCTOBER 22, 1979, [79-2 CPD 275](#).

The University of South Carolina utilized Wenger product numbers and descriptions to establish the basis for brand name or equal specifications for this solicitation. The solicitation did not identify products from any other manufacturer that would be acceptable. Nor did the solicitation

list the salient characteristics of the Wenger products needed to meet the University's requirements. These actions created a noncompetitive environment and denied Melhart the ability to compete on an equal basis with Wenger.

In addition, the inconsistencies between the Memo To Record and the email from Dr. Brozak citing reasons for rejecting Melhart's bid along with USC's attempt, during the hearing before the CPO, to raise differences between Wenger products and products bid by Melhart as salient characteristics and consequently grounds for rejecting Melhart's bid gives the appearance of, if not an actual, improper predisposition for the Wenger products.

This brand name or equal solicitation required the submission of specification sheets from bidders offering products other than Wenger (Solicitation at pages 8 and 13) in order to determine their equivalency to the Wenger products and consequently their responsiveness to the bid. Melhart failed to submit the required specification sheets and consequently USC was unable to determine, based on the information submitted, whether the products bid were responsive to the IFB. USC considered Melhart's failure a minor informality under §11-35-1520(13)(g), which lists the failure of a bidder to furnish cut sheets or product literature as an example of a minor informality or irregularity, and allowed Melhart to submit the specifications sheets after bid opening.

However, in this case, the specification sheets were essential in determining the responsiveness of Melhart's bid and not merely a matter of form or some immaterial variation from the exact requirements of the IFB. (§11-35-1520(13)) Consequently, the failure to submit the specification sheets could not be waived or cured. On its face, Melhart's bid was not responsive.

The Panel has ruled repeatedly that State procurement officials cannot clarify a nonresponsive bid. In Case No. 1996-2, In re: Protest of Two State Construction Company, the Panel held that "[t]he procuring agency may not seek clarification before making a determination of responsiveness, but must find a bid nonresponsive if it feels clarification of the bid is needed." In Case No. 1988-5, In re: Protest of CNC Company, the Panel held that General Services...could not contact CNC after the bids were opened for clarification. To do so would have been patently



unfair to the other bidders....” The Panel finds that MMO could not contact Ross to clarify the 90 day termination language and that the bid was therefore non-responsive on this issue.

*In Re: Protest of Abbott Laboratories*, Case No. 1997-4. *See, also*, R. 19-445.2080 (clarifications can't be used in an IFB unless the bidder "has submitted a bid or offer which obviously conforms in all material aspects to the solicitation," i.e., they're responsive).

### **Determination**

This brand name or equal solicitation did not list any acceptable manufacturers other than Wenger, nor did it list any salient features for the Wenger products specified. The CPO determines that USC used defective specifications.

Testimony before the CPO also indicated that the award of all line items to a single bidder limits competition in this marketplace to two potential bidders; Wenger and Melhart. USC is advised that Regulation 19-445.2140 states that it is the policy of the State that specifications permit maximum practicable competition. The aggregate award of various line items without a reasonable basis is inconsistent with this policy.<sup>4</sup>

USC erroneously waived Melhart's issues of non-responsiveness by requesting specifications sheets to determine responsiveness. The basis for USC's determination of non-responsiveness relied on information improperly requested from the bidder.

Melhart failed to comply with an essential requirement of the solicitation; the submission of descriptive literature adequate to allow USC to determine whether or not Melhart's equipment was equal. Melhart's bid was materially non-responsive and cannot be awarded this contract.

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<sup>4</sup> Additional guidance In the MATTER OF: Systems, Terminals & Communications Corp., May 21, 1985, US Comptroller General, and Matter of: Pacific Sky Supply, Inc., November 23, 1987, US Comptroller General

The end user's and procurement manager's reasons for rejecting Melhart's bid were inconsistent and give the appearance of an improper predisposition for the Wenger products.

For these reasons the CPO orders that this solicitation be revised to comply with the law and rebid.

**Protest Affirmed.**

For the Information Technology Management Office

A handwritten signature in cursive script, reading "Michael B. Spicer".

Michael B. Spicer  
Chief Procurement Officer



## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: [www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2008 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 310, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

**Melhart**  
**MUSIC CENTER**

3325 NORTH 10 STREET  
McALLEN TX, 78501  
(956) 682-6147  
(956) 682-4253 FAX

April 8-2009

Voight Shealy  
Chief Procurement Officer  
University of North Carolina  
1201 Main Street, Suite 600  
Columbia, SC 29201

Response to USC-IFB-1425-LW-Rebid

Please let this letter serve as our PROTEST to the aforementioned Bid.

The findings submitted to Melharts on this bid to disqualify Melhart Products due to "Technical Specifications" is inaccurate at least, if not discriminatory.

I feel like any of the specifications set forth in this finding to disqualify Melharts bid are items that even if they were true, which they are not, would have nothing to do with the function ability of the product to perform for the actual needs of the product. Therefore these findings should not even have been considered even if they were true to cost the school district approximately \$55,656 extra in non performing specifications.

This action appears to be adversarial to the selected portions the South Carolina Consolidated Procurement Code 11-35-20 and 11-35-30.

**SECTION 11-35-20. Purpose and policies.**

The underlying purposes and policies of this code are:

(a) to provide increased economy in state procurement activities and to maximize to the fullest extent practicable the purchasing values of funds while ensuring that procurements are the most advantageous to the State and in compliance with the provisions of the Ethics Government Accountability and Campaign Reform Act;

(b) to foster effective broad-based competition for public procurement within the free enterprise system;

(c) to develop procurement capability responsive to appropriate user needs; .....

(f) to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement;

(g) to provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process; and

**SECTION 11-35-30. Obligation of good faith.**

Every contract or duty within this code imposes an obligation of good faith in its negotiation, performance or enforcement. "Good faith" means honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.

The items being used to disqualify Melharts bid are superficial and are not the most ethically advantageous to the State.

The items being used to disqualify Melharts bid discriminate against effective broad based competition for public procurement with in the free enterprise system.

The items being used to disqualify Melharts bid are not responsive to appropriate user needs, and are not in good faith to qualify those disqualifying specifications.

The items being used to disqualify Melhart bid are not fair and equitable treatment to competitive bidders., and tend to loose public confidence of the bidding process.

Melharts hopes that the protest of this attempt to disqualify Melharts bid is adequately a safeguard to have fair bidding procedures be followed by the States Procurement Policies.

Melharts Position of Items to attempt to disqualify Melharts Bid:

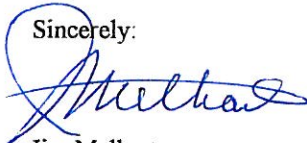
- 1) Item # 16: The Melhart SRBOCUBLK chair as set forth in the specifications submitted with the bid are steel frame posture chairs. The Melhart Posture Chair exceeds all of the specifications set out in the bid model.
  - a. Enclosed is a copy of the Melhart Specification Sheet, Which does not use the word " metal" even though it specifies "1"" square tubing" which is what the steel tubing is called.
  - b. Also enclosed is the Wenger technical sheet which also does not mention the word "steel".

- 2) Item # 18: The Manhasset Music stands bid by Melhart are steel base and shaft as specified. The desk on the model #48 is Aluminum. This stand has been the standard of the music industry for over 50 years. The Manhasset Music Stand exceeds all of the specifications set out in the bid model, and the stand has a ten year warranty, twice as long as the Wenger stand specified.
- a. Enclosed is the Manhasset Model #48 specifications and the warranty sheet
  - b. Also enclosed is the Wenger spec sheet.
- 3) Item #'s 1-7: 15-20ACH, 10-30 ACH, 10-40 ACH, 6+1 -40 ACH3-30ACH, and 2-40 ACH Every item on Melhart Specification sheet explicitly addresses every detail that clearly show the specifications of Melhart Cabinets meet or exceed the specifications set forth in the bid. The Melhart cabinets quoted are Acoustic cabinets, compartmental grill, Cherry Laminated, with thermoset polyester laminate. The Melhart storage cabinets exceed all of the specifications set out in the bid model. The bid model does not specify "composite wood". Melharts is always agreeable to change items with in reason to work with our clients.
- a. Enclosed are the Melhart Cabinet Specifications that show the materials to be the same as the Bid Model.
  - b. Also enclosed is the Wenger spec sheet that Melhart cabinets adhere or exceed the Bid Model Specifications.

I hereby request that this evaluation report can be reviewed and accordingly corrected and the bid be awarded to Melhart Music. I know that you will be 100% satisfied with our products.

Please reply.

Sincerely:



Jim Melhart  
Melhart Music

Attached: Spec pages for Bid Form and Bid specifications for Melhart Storage Cabinets, Posture Chair, & Manhasset Music Stand  
cc: Lana Widener, Procurement Officer

## Attachment 2

### MEMO TO RECORD

On March 31, 2008, I received the Band Department's evaluation finding for the lowest price bid. I have reviewed the findings of the Band Department in its review of product literature submitted by Jim Melhart Piano and Organ Company with its bid submitted in response to USC-IFB-1425-LW-Rebid, Furnish, Deliver, and Install New Music Equipment for Band Hall. In its findings, the department says that the Offeror did not meet the following technical specifications in the solicitation with the following nine items:

- 1) Melhart Model # SRBOCUBLK chairs bid for Item #16 (Musician Chair):  
\*Chairs bid by Offeror are not steel according to its product literature;
- 2) Melhart Model # 48 bid for Item #18 (Music Stands):  
\*Music Stand bid by Offeror are not steel according to its product literature; and
- 3) Melhart Model #'s 15-20ACH, 10-30ACH, 10-40ACH, 6+1-40ACH, 3-30ACH, 3W-30ACH, and 2-40ACH cabinets bid for Item #'s 1-7 (Music Education Storage casework, Acousti-cabinets, compartmental grille doors, Cherry laminate) :  
\*Cabinets bid by Offeror are not composite wood with thermoset polyester laminate according to its product literature.

After reviewing the department's findings, I agree with the findings. While the offer from Jim Melhart Piano and Organ Company was the lowest price bid for the lot, the solicitation states that "the items offered must be equal in quality and performance." The Melhart products noted above clearly do not meet the specifications. Therefore, based on the items cited above the bid received from Jim Melhart Piano and Organ Company is deemed non-responsive to solicitation #USC-IFB-1425-LW-Rebid, Furnish, Deliver, and Install New Music Equipment for Band Hall, and therefore, it is removed from further consideration by the State. We will proceed to evaluate the next lowest price bid for responsiveness.

### Attachment 3

**WIDENER, LANA**

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**EXHIBIT 6**

**From:** George Brozak [gbrozak@mozart.sc.edu]  
**Sent:** Tuesday, March 31, 2009 4:25 PM  
**To:** WIDENER, LANA  
**Subject:** Bids

Lana,

I reviewed the cut sheets submitted and have the following issues:

- 1) The chairs on the bid from Melhart are not padded. They are simply plastic chairs. This is nowhere near the quality we want.
- 2) I see no product information on the "Rack 'N Roll" from Melhart. What weights do they hold? What is the metal construction? What is the size of the casters? What are the dimensions?
- 3) What is the warranty on the products from Melhart? Wenger is offering 15 years on cabinets and 5 years on everything else.
- 4) The Melhart Library System says it is on tracks. How does it support the weight of the unit when it's fully extended? Do the tracks run out into the floor? Are the individual cabinets on casters? What weight do they hold?
- 5) The acoustic treatment of the instrument cabinets are nowhere to be found. It simply says it can be added (on the second page of the catalog) for "\$50.00 per cabinet". Are acoustic properties CONSTRUCTED into the cabinets, or simply added later? In other words, is this an "add-on" feature? If so, that is unacceptable.
- 6) The shelves in the units are stated to be constructed of ABS plastic (like the chairs). This is not long-lasting material. Wenger products are Polyester Laminate. Much stronger/durable.
- 7) The stands quoted (Manhasset) have a plastic desk. Wenger has steel. Much more durable.

Thanks,  
George